

STATE OF VERMONT
WASHINGTON COUNTYAUG 31 2009
District Court of Vermont
Unit No. 3, Washington Circuit

State of Vermont

v.

Zachary Bushey,
DefendantDISTRICT COURT
Docket No. 416-4-08 WncrDECISION ON MOTION TO SUPPRESS

This case is before the Court on the defendant's Motion to Suppress statements he made to the police while he was being interrogated on April 16, 2008. Zachary Bushey was interrogated by Officer Twohig for more than seven hours about injuries suffered by a 17-month-old child whom Mr. Bushey, among others, supervised and cared for. The injuries were thought to be the result of abuse. As a result of his statements during the interrogation, all of which was preserved on video, Mr. Bushey was charged with two counts of first degree aggravated domestic assault.

The defendant filed a Motion to Suppress on October 29, 2008 and the State responded on November 10, 2008. A hearing on the motion was held on March 30, 2009. The State filed a further response, Opposition to the Motion to Suppress, on July 6, 2009, and the defendant filed a Supplemental Memorandum to the Motion to Suppress on July 7, 2009. Mr. Bushey is represented by Maggie Vincent, Esq. and the State is represented by Deputy State's Attorney Aaron Toscano. Based on the evidence and the arguments before the Court, the Motion to Suppress is granted.

FACTS

1. Zachary Bushey is a 22-year-old male who, at the time the relevant events occurred, was living with his fiancée, Raeanne Boule, and her 17-month-old daughter, C.B., in North Montpelier. Mr. Bushey was one of the people who cared for and supervised C.B. while Ms. Boule was at work.
2. On about April 8, 2008, an investigator from the Department of Children and Families was contacted to investigate a case of suspected child abuse. The child, C.B., had been

taken to Dartmouth Hitchcock Medical Center for a fractured left humerus and a fractured elbow.

3. After an initial interview with Zachary Bushey, a follow-up interview was scheduled for April 16, 2008 at the Middlesex Police Barracks.
4. The interview/interrogation lasted for about 7½ hours. At the beginning of the interrogation, while speaking with Detective Aimee Nolan, Mr. Bushey agreed to take a polygraph exam. Detective/Sargent Edward Twohig came in to speak with Mr. Bushey about polygraph exams in general and about how his polygraph exam would be conducted. Det./Sgt. Twohig spent about an hour and a half setting up the polygraph equipment and establishing a rapport with Bushey. Among other topics of discussion, he spoke with Bushey about music they both like.
5. Throughout the interrogation, Bushey had a very compliant demeanor. He wanted to help figure out how C.B. was injured and he was very cooperative. He was also clearly nervous and very anxious.
6. At the beginning of the interrogation, Det./Sgt. Twohig described his credentials to Bushey and explained the accuracy of polygraph exams. He told Bushey "[m]y job is to come in and get a polygraph; my job isn't to arrest people." About half an hour into the interrogation, Twohig told Bushey that "taking a polygraph has elements of teamwork."
7. At another point, Twohig told Bushey that he had a history of working with the staff at Dartmouth Hitchcock Medical Center and based on that experience, if they said C.B.'s injuries were caused by abuse and not by accident, then it was abuse.
8. During this phase of the interrogation and throughout the entire 7½ hours, Det./Sgt. Twohig ended almost every sentence with "Right?" and Bushey almost invariably nodded in agreement or answered affirmatively.
9. At the beginning of the interrogation, Zach Bushey said that he thought C.B. injured her arm when she fell out of the shower. Bushey had turned his back for a moment and when he turned around she had fallen. Bushey said C.B. dislocated her shoulder during the fall and Bushey "popped" it back in. Until about five hours in to the interrogation, he maintained this was how C.B. injured her shoulder. At that point, Mr. Bushey told Det./Sgt. Twohig about something that had happened ten minutes before the shower incident when he was feeding C.B. He got mad at her and yanked her up by her arms and

threw her on the couch. Bushey told Twohig that the shower incident did happen and he had assumed that's how her shoulder was injured. Bushey said "[a]ll I can visualize is the shower. That's all I can see happening. The whole time I haven't been blaming myself and now I am."

10. Before Mr. Bushey admitted to yanking on C.B.'s arm, Det./Sgt. Twohig used different kinds of coercive tactics. He blurred his role of adversary into that of advocate. He told Zach Bushey many times in different forms that "[i]f you were responsible for hurting the kid, tell me now, I'll help you deal with it. If you lost your temper with the kid, I'll be the first one to stick up for you and help you." He said he would tell the prosecutor that "this is a good kid. He made a mistake a couple of times, don't beat him up, go on probation for awhile, where you don't go to jail just stay out of trouble for a little while."
11. A few minutes before Zach Bushey admitted to yanking on C.B.'s arm, Det./Sgt. Twohig said: "If you made a couple of mistakes here, I will help you put the best possible spin on it. In my experience here is that if a guy admits it, takes responsibility for his actions when he made a mistake . . . that usually what happens is the judges are people too, they're just like 'Hey you know what? This kid's a good kid.' They listen to our opinions . . . Anybody that asks me my opinion about this case it's not ethical for me to promise you anything, I can't speak for the State's Attorney or the judge, but what I can tell you is I keep my word and I can tell you what my opinion is because quite often, the prosecutors and such will ask me what I think and I can speak freely about that."
12. Dr. Jonathan Weker, a licensed psychiatrist testifying on behalf of the State, was particularly concerned by Det./Sgt. Twohig's statement to Bushey (after admitting to one injury but not another) that "I am going to work with you today so that you negotiate this, put the best spin on this as possible." Dr. Weker explained that the implication of this statement was that Twohig was indicating to Bushey that we would act as an advocate on his behalf.
13. After Bushey admitted to causing the shoulder injury, he wrote an affidavit describing what happened. Twohig left the room and came back about ten minutes later. Det./Sgt. Twohig read the statement out loud and then began asking Bushey about the elbow injury.

14. Zach Bushey flatly denied having any idea how C.B.'s elbow injury occurred. Twohig repeatedly said to Bushey that if he decided to leave the interrogation without admitting to the elbow injury as well and Twohig later found out Bushey was responsible for both, he would not do anything to help him. Twohig then threatened Bushey by implying he had influence in charging and sentencing decisions: "These things [the two injuries] could be viewed as a couple of small things that happened like a simple assault or they could be viewed as aggravated assault where the elbow was broken. An aggravated assault carries a maximum penalty of 15 years."
15. At different times, Twohig told Bushey that if he confessed now to causing both injuries, it would be better than confessing to one now and Twohig finding out about the other one later. "Two for one is a lot better than two separate hits."
16. During the last few hours of the interrogation, Zach Bushey talked about making up what happened and confessing that he made up stories in order to leave the room. For example, he said "I feel like I have to make something up to get out of here today" and then talked about ways C.B. *could* have been injured. About the elbow injury specifically he said "In order for any of this to happen, I'd have to sit down and think up some made up story of how her elbow got broken to get out of this room right now."
17. Twohig told Bushey not make up a story or admit to something he did not do. Bushey then asked Twohig why he was trying to get him to admit to injuring C.B. Twohig replied: "[b]ecause I think you did [injure her]."
18. For more than the first half of the interrogation, Bushey was compliant, attentive, friendly and willing to talk. His manner visibly changed when it was clear to him that Twohig did not believe that he didn't injure C.B. He became frustrated with having to repeat the same things and reiterate that he was not lying. Ultimately, he appeared sad and defeated. At one point Bushey said, in response to Twohig's comment that he was free to leave, "everyone is going to accuse me if I get up and walk out of here." Twohig kept questioning Bushey about the elbow injury and Bushey kept repeating that C.B. was already injured when she came back from visiting with her dad. Bushey said "If I have to say again, he [dad] had her and she came back like that, I'll scream."

19. Bushey was frustrated with sitting all day and stood up. Twohig said that Bushey was not allowed to stand during the interrogation and Bushey replied "I just don't want to sit in this f__ing chair anymore."
20. Eventually, Bushey did admit to breaking C.B.'s elbow. He first said he dropped her while he was doing too many things in the kitchen and then fell on her. Twohig asked him questions about how it happened and then had him demonstrate while holding a doll. Bushey wrote a statement describing this event. Twohig told him that this story was not likely and Bushey said he had to make something up to get out of the room. Zach Bushey then told Twohig about being on the porch with C.B. and her falling down the stairs. Bushey finally told a third story that involved him pushing C.B. away forcefully and when Twohig and Nolan asked Bushey if this was the truth, he said "Yah, that's my truth."
21. At the end of the interrogation, Zach Bushey was crying, and Det./Sgt. was worried that he was a danger to himself because he was so emotionally unstable.
22. Doctor Kinsler diagnosed Bushey with major depression disorder, recurrent; attention deficit disorder; marijuana dependent (had smoked the night before the interrogation and may have been a factor in his not being appropriate subject for polygraph); dependent personality disorder with antisocial traits.
23. As a result of the interrogation, Bushey was charged with two counts of first degree aggravated domestic assault.

DISCUSSION

The ultimate question in determining if a confession was coerced is whether "the pressure, in whatever form, was sufficient to cause the [defendant's] will to be overborne and his capacity for self-determination to be critically impaired." *State v. Zehner*, 142 Vt. 251, 254 (1982) (quoting *Ferguson v. Boyd*, 566 F.2d 873, 877 (4th Cir.1977)). Rarely is just one factor dispositive in answering this question; each case requires a close analysis of the situation and a fact-specific determination of whether the defendant's will was overborne. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). "Whether a confession is a product of coercion may only be determined after a careful evaluation of the totality of all the surrounding circumstances,

including the accused's characteristics, the conditions of the interrogation, and the conduct of law enforcement officials." *U.S. v. Anderson*, 929 F.2d 96, 99 (2d Cir.1991).

The court recognizes that police interrogators use psychological techniques while questioning suspects and this practice is allowed to some degree. See *State v. Bacon*, 163 Vt. 279, 293 (1995) (citing *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir.1986)). In light of this regular practice, the Court must determine in this case "whether [] [the] statements were so manipulative or coercive that they deprived [defendant] of his ability to make an unconstrained, autonomous decision to confess." *State v. Zehner*, 142 Vt. 251, 254 (1982). The burden is on the State to prove, by a preponderance of the evidence, that the defendant's statements to the police were voluntary. *U.S. v. Anderson*, 929 F.2d 96, 99 (2d Cir.1991). In making a determination under the totality of the circumstances, the Court will first examine Mr. Bushey's characteristics, the conditions of the interrogation, and Det./Sgt. Twohig's conduct, including coercive and psychological tactics used, and analyze whether they affected Mr. Bushey's decision to confess.

Characteristics

At the time of the interrogation, Zach Bushey was 22 years old and had little previous experience with the police. He was interviewed by Dr. Philip Kinsler, a clinical and forensic psychologist. Dr. Kinsler interviewed him twice – on December 9, 2008 for three hours, and on December 22, 2008 for about two and a half hours. Dr. Kinsler found Mr. Bushey to be depressed, anxious, passive, and compliant. (Defendant's Ex. A, Kinsler Exam 16, 12/29/08). Two of these characteristics were apparent from watching the video of the interrogation. Throughout the entire 7½ hour long interrogation, Mr. Bushey was compliant with Det./Sgt. Twohig's instructions and eager to answer his questions and please him. Bushey also seemed anxious and nervous throughout the interrogation – he was biting his nails, squirming in the uncomfortable chair and had an overall nervous demeanor. His depression was not apparent until later on in the interrogation when he began talking about how C.B. could have been injured.

During the interrogation, his youth and naïveté were apparent because he exhibited fascination with parts of the process, rather than properly viewing the interrogation as an adversary process. For example, when Det./Sgt. Twohig explained to him about polygraphs and how they work, he responded "I didn't know that!" Bushey readily agreed when Twohig

frequently said "Right?" and seemed to approach the interrogation from the standpoint of wanting to help the police figure out how C.B. had gotten injured.

His compliance with Det./Sgt. Twohig and fascination with the polygraph portion of the interrogation illustrate Bushey's innate misunderstanding of the nature of the interrogation process. His lack of experience with police interrogation and his compliant and submissive personality are factors for the Court to consider in a voluntariness determination. (Kinsler Exam 26, 29, 12/29/08); see *U.S. v. Anderson*, 929 F.2d 96, 99 (2d Cir.1991).

Interrogation Conditions

The interrogation took place in a small windowless room with a desk, a chair, a polygraph chair near the door, and nothing on the walls. Bushey was isolated in the room with Twohig and had no contact with his father or an attorney. Bushey was offered water at the beginning of the interrogation and took a bathroom break early in the day.

The entire interrogation lasted for 7½ hours, a long period of time to be isolated and questioned. However, the length of this interrogation, is not, in and of itself, coercive; it is one factor to be considered. *People v. Medina*, 25 P.3d 1216, 1222 (Colo. 2001). It is significant, however, that Mr. Bushey did not confess to causing the first injury until more than five hours into the interrogation. He did not begin to confess to causing the second one until about six hours into the interrogation. Before Bushey confessed, he made comments to the effect of "I need to make up a story or I won't get out of here." Without more, the interrogation conditions were not inherently coercive but the extended length of the interrogation, combined with the isolation from supportive family members, clearly played a role in overbearing Mr. Bushey's will.

Police Conduct - Minimization

Minimization, where the police work to minimize the moral seriousness of the offense in the eyes of the suspect, is a coercive technique that was used extensively (Kinsler estimates about 100 times) by Sargent Twohig. (Kinsler Exam 23, 12/29/08). Like interrogation length, minimization of the crime does not render a confession coerced per se, but it is an important factor to consider because it is such a psychologically coercive tactic. "[C]ommon sense tells us that a person being asked by an interrogator to confess to a crime that is repeatedly described as understandable, justifiable, and not particularly serious would likely assume that giving the

requested confession will result in lenient treatment.” *Commonwealth v. Giambattista*, 813 N.E. 2d 516, 527 (Mass. 2004). During the interrogation, Twohig repeated that Bushey’s crime was “understandable, justifiable, excusable, and not that serious. Research suggests that such ‘minimization’ of the crime by an interrogator implies leniency if the suspect will adopt that minimized version of the crime, and that leniency can thereby be implicitly offered even if it is not expressly stated as a quid pro quo for the confession.” *Commonwealth v. Giambattista*, 813 N.E. 2d 516, 526 (Mass. 2004).

Twohig minimized the Bushey’s alleged offense in many ways. First, he characterized the injuries as mistakes or accidents. He repeated that Bushey was just a nice guy who made a mistake. “Things in life happen to you and everybody makes mistakes.” (Interrogation Tape 1 at 4:27:00). Det./Sgt. Twohig also implied that what happened to C.B. was not a big deal. He told Bushey that he was not accused of doing anything terrible to C.B. and it was probably just a mistake or it happened because Bushey became frustrated. At one point, Twohig told Zach that with crimes like these, “[i]t’s almost always a nice person who’s frustrated. They got no intention of hurting anyone, they’re just frustrated. To me, that’s not a big deal . . . If the child’s not dead, it’s not a big deal.” (Interrogation Tape 1 at 27:40). Twohig repeatedly justified Bushey’s actions as reasonable because children can be frustrating and it is very easy to lose one’s temper. This constant reinforcement of the understandable nature of the crime played a role in Bushey’s confessions.

Implied Promise/Leniency

The most manipulative tactic used by Sargent Twohig during this interrogation was the use of implied promises of leniency if Bushey confessed. “[C]ourts have rather consistently held that a confession is involuntary if made in response to a promise that the result will be nonprosecution, the dropping of some charges, or a certain reduction in the punishment defendant may receive.” W. LaFare & J. Israel, *Criminal Procedure* § 6.2, at 267 (1985). The Vermont Supreme Court has held that “confessions are inadmissible if the defendant was influenced by any threat or promise.” *State v. Comes*, 144 Vt. 103, 108 (1984) (citing *State v. Walker*, 34 Vt. 296, 301 (1861)). The promise need only be one of the many possible factors that induced the defendant to confess; the court need not find that a promise was *the* reason the defendant confessed. See *State v. Beckley*, 157 Vt. 446, 449 (1991). The tactics used by Det./Sgt.

Twohig combined both promises and threats. "[A] statement by a police officer that would taint a confession 'is not a general statement about the value of cooperation but a promise that cooperation by the defendant will aid the defense or result in [leniency].'" *State v. Beckley*, 157 Vt. 446, 449 (1991) (citing *Commonwealth v. Williams*, 448 N.E.2d 1114, 1121 (1983)). While the statements made to Bushey were implied promises, the intention behind the statements was clear. Throughout the interrogation, Twohig indicated that he would advocate for lenient treatment for Bushey if he confessed to him.

Doctor Kinsler counted 19 occasions where implied promises were made to Mr. Bushey, including comments by Twohig implying that if Zach Bushey admitted responsibility for hurting C.B., Twohig would be the first person to stick up for him; if Bushey were to tell the truth, Twohig would "put the best spin on it so [he] [could] negotiate it the best way possible." (Interrogation Tape 1 at 4:39:00); Det./Sgt. Twohig emphasized the amount of influence he has with the judges and the prosecutors and said he would tell them what a good guy Zach is; and Twohig offered to speak on Bushey's behalf and try to get him probation or something other than jail. (Interrogation Tape 1 at 5:04:00). All these promises of leniency were made with the caveat that Mr. Bushey tell Sargent Twohig what happened.

After Bushey confessed to causing the first injury, Twohig tried to get him to confess to causing the second injury. Det./Sgt. Twohig combined a promise with a threat and told Bushey if he walked away without confessing to the second injury and Twohig later found out he did it, Twohig would not do anything to help Bushey. The Sargent then commented on his substantial influence with the State's Attorney: "[p]rosecutors have a lot of discretion how they view things. Police officer's opinion means a lot." (Interrogation Tape 1 at 5:10:00). Finally, Twohig tried to get Bushey to confess by threatening jail time if Bushey didn't confess: "These things [the two injuries] could be viewed as a couple of small things that happened like a simple assault or they could be viewed as aggravated assault where the elbow was broken. An aggravated assault carries a maximum penalty of 15 years." (Interrogation Tape 1 at 5:11:00).

Coercion

Twohig used other coercive tactics during the interrogation. He confused Bushey about the character of the interrogation by telling him that his job is *not* to arrest people. He also told Bushey that taking a polygraph exam has elements of *teamwork*. He chatted with Bushey,

establishing a rapport, and his comments set the tone for a friendly conversation, rather than an adversarial interrogation. Sargent Twohig's tactics worked well because Bushey did not behave as though he was not being interrogated. He talked about trying to figure out what happened to C.B. and wanted to work with Twohig. Det./Sgt. Twohig also implied that he was working on Zach Bushey's behalf by telling him that he was not the type of person who should go to jail; he needed counseling and maybe probation but he had to admit to hurting C.B. These comments led Bushey to believe that if he confessed, Twohig would help him get counseling and probation.

Other coercive strategies used by Twohig included trying to keep Mr. Bushey from leaving when he clearly wanted to. "Telling the truth before you leave this building today is very important to you. Worst possible thing for you to do today is to only admit to half of what's going on. Cause if it's proved that you were involved in everything that's going on that's gonna make you look way worse than look good." (Interrogation Tape 1 at 5:50:00).

Totality of the Circumstances

"[T]he ultimate inquiry is whether, under the totality of the circumstances surrounding a confession, the suspect's will was overborne by the police." *State v. Pontbriand*, 2005 VT 20, ¶ 22, 178 Vt. 120 (citing *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). "The totality of the circumstances approach recognizes the synergistic nature of coercive interrogations. The combination of many subtle police tactics often results in a coercive atmosphere that is obscured when the context is broken down to its constituent parts." *State v. Pontbriand*, 2005 VT 20, ¶ 35 (Johnson, J., dissenting). It is not necessarily any one coercive interrogation tactic that makes a confession involuntary, but the presence of more than one, working together, to overbear a suspect's will. See *State v. Pontbriand*, 2005 VT 20, ¶ 30.

In evaluating the totality of the circumstances, the Court views the different coercive tactics as working together to weaken the defendant's decision-making abilities. Here, Sargent Twohig used many tactics to create a coercive atmosphere, including minimization of the offense, implied promises of leniency and assistance by Twohig, confusing Bushey about the nature of his role, plays on Bushey's strong feelings for C.B., his desire to help her, and his guilt over her being hurt.

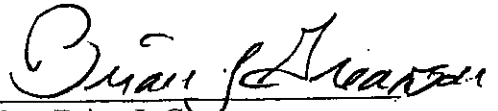
The coercive tactics used in concert lead the Court to conclude that Mr. Bushey's statements were involuntary. There were also external signs that his will was overborne during

the 7.5 hours of interrogation. He made comments about fabricating explanations so he could leave the room; his demeanor changed from cooperative and helpful to defeated and depressed; he did not begin to speculate about causing the injuries until more than five hours into the interrogation. A person like Mr. Bushey, with less savvy and experience with the criminal justice system and who is so compliant, is less likely to be able to resist police pressure during an interrogation.

DECISION

The Court finds that taken together, the tactics used by the police, the location and duration of the interrogation, and Mr. Bushey's personal characteristics lead to a finding of involuntariness. The State has not proved by clear and convincing evidence that Mr. Bushey's confessions were voluntary. Accordingly, the defendant's Motion to Suppress is granted.

Dated at Barre, Vermont, this 28th day of August 2009.



Hon. Brian J. Grearson
District Court Judge